Supreme Court, U.S.
FILED

001730 MAY 17 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PAUL FRASER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

MARK A. WOLBER
239 Genesee Street, #307
Utica, New York 13501
(315) 724-3127

FRANK E. BLANDO
Counsel of Record
811 Court Street
Utica, New York 13502
(315) 735-3556

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 pp

QUESTION PRESENTED

Whether a citizen has a right, under the First Amendment to the Constitution of the United States, to be in possession of child pornography for legitimate, scientific and educational research purposes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 6

I. THE NEW YORK STATE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S RULING IN NEW YORK v FERBER, 458 US 747 6

II. THE NEW YORK COURT OF APPEALS' RULING CONTRADICTS THE LANGUAGE IN CONCURRING OPINIONS OF THIS COURT IN *NEW YORK v FERBER*, 458 U.S. 747 8

III. THIS CASE PRESENTS THE ISSUE OF PURE POSSESSION FOR RESEARCH PURPOSES. IT DOES NOT INVOLVE THE CREATION OR DISSEMINATION OF CHILD PORNOGRAPHY 9

IV. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS PRECLUDES ANY RESEARCH IN THE AREA OF CHILD PORNOGRAPHY 11

CONCLUSION 13

TABLE OF CONTENTS – Continued

Page

APPENDIX

OPINION OF NEW YORK STATE COURT OF APPEALS .....App. 1

OPINION OF THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH DEPARTMENT .....App. 12

RECORD OF CONVICTION, ONEIDA COUNTY COURT .....App. 24

TABLE OF AUTHORITIES

Page

CASES

New York v. Ferber, 458 U.S. 747 (1982) 6, 8, 9, 10

People of the State of NY v. Fraser, 264 AD2d 105 (2000) 1

STATUTES

New York State Penal Law,
Section 263.16 .....2, 4

Section 263.11 4

Section 263.15 8

28 U.S.C. § 1257 1

CONSTITUTION

U.S. Constitution, Amendment 1 .....2, 6, 7, 10, 13

U.S. Constitution, Amendment 14 2

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the New York State Court of Appeals, entered in this proceeding on February 20, 2001.

OPINIONS BELOW

The opinion of the New York State Court of Appeals that gives rise to this petition has not been reported and is reprinted in the appendix hereto.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, filed February 16, 2000, is cited 264 AD2d 105 (2000) and is reprinted in the appendix hereto.

The Petitioner was convicted in the County Court for the County of Oneida following a jury trial on January 29, 1999, a record of his conviction is reprinted in the appendix.

JURISDICTION

The judgment of the New York State Court of Appeals was entered February 20, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides in pertinent part as follows: "Congress shall make no law . . . abridging the freedom of speech . . . "

The Fourteenth Amendment of the United States Constitution provides in pertinent part as follows: "No state shall . . . deny any person within its jurisdiction the equal protection of the laws."

Section 263.16 of the New York State Penal Law, provides: "A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age."

(There are no statutory defenses for possession of such material for persons having scientific, educational, governmental or other similar justification.)

STATEMENT OF THE CASE

A. Statement of Facts

Defendant is a retired Air Force Captain with a Master's Degree in Social Work, who has had extensive experience, both as a member of the Air Force and as a civilian, in the field of child sexual abuse, treating both offenders and victims.

In early 1997, Defendant was invited to join a work group formed at the request of the Oneida County District Attorney's Office for the purpose of developing an assessment and treatment program for persons convicted of child pornography on the Internet.

After having attended a meeting of this group and determining that no relevant research existed, Defendant began downloading the screen name of individuals transmitting child pornography and the pornography they transmitted from the Internet. Defendant's objective was to identify a large number of individuals transmitting child pornography over the Internet, to survey those individuals and to develop a profile of such individuals in order to provide the data necessary to develop a program for the assessment and treatment of those offenders.

Defendant had informed members of the committee, as well as other professionals in the field, of his research and had shared with some of them the actual survey he was using.

Defendant neither printed nor displayed any of the graphic images sent to him, but retained them on the hard drive on his personal computer. He neither created nor transmitted any child pornography. He had not used, nor had been accused of using, the Internet to make connections with children for the purpose of engaging in illicit activities.

On June 12, 1998, Defendant brought his computer to a repair shop for service. The Defendant attempted to wait while the service was performed, however, a malfunction occurred and the repairman told the Defendant, although falsely, that the computer could not be repaired

for several hours. Thereupon, the Defendant left his computer in the custody of the repairman. The repairman, out of curiosity, displayed some of the images from the hard drive and discovered some of them were child pornography. He contacted the New York State Police who obtained a warrant, seized the Defendant's computer from his home and arrested the Defendant.

The Defendant was indicted on four charges, two counts of possessing a sexual performance by a child, in violation of Section 263.16 and two counts of possessing an obscene sexual performance by a child, in violation of Section 263.11. The indictment alleged that Defendant possessed the same material on two separate days, the first when the computer was brought to the repair shop and the second when the computer was seized from his home.

One week prior to trial, the District Attorney dismissed the two counts of the indictment charging Defendant with possession of an obscene sexual performance by a child, leaving the two counts of possessing a sexual performance by a child.

Defendant acknowledged having possessed the child pornography on his computer, but contended that he did so for legitimate scientific purposes in conjunction with research he was conducting and thus his possession was protected by the First Amendment of the United States Constitution.

Defendant requested that the trial court permit the jury to consider, as a defense, that he possessed this material for research purposes. The trial court denied the

request and did not so instruct the jury. Thus, the Defendant was not afforded the opportunity to have the jury consider this defense.

Following the jury trial in Oneida County Court, the Defendant was found guilty of both charges. He was sentenced and a Judgment of Conviction was entered on March 25, 1999.

B. Proceedings Below

The Petitioner had raised the issue of whether his possession was protected by the First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, before the trial court by requesting that the court instruct the jury to consider the purpose of his possession.

The Judgment of Conviction was affirmed by the Appellate Division of the Supreme Court, Fourth Department. Petitioner had raised before that court, among other grounds, that his conviction violated his First Amendment Constitutional rights because he had possessed such material for scientific research purposes.

The Appellate Division rejected Petitioner's constitutional challenge to his conviction.

In its opinion, that Court wrote, "Defendant's constitutional arguments must be rejected. Child pornography is not protected speech under either the Federal or State Constitutions."

Petitioner then appealed to the New York State Court of Appeals, which also affirmed his conviction. That Court also rejected Petitioner's Constitutional arguments.

That Court wrote, "Defendant challenges his conviction as a violation of his First Amendment right of his freedom of expression and his equal protection rights under the Federal and State Constitutions. Defendant does not assert that the statute should be declared unconstitutional because it is especially overbroad, but rather asserts that the statute is overbroad as applied to him and other classes of people who may legitimately come into possession of pornography."

However, the Court of Appeals found that there are no circumstances under which the First Amendment allows the possession of child pornography.

"The First Amendment, however, does not protect pornographic material involving children . . . "

Petitioner now requests a Writ of Certiorari so that the United States Supreme Court may determine the First Amendment issues involved.

REASONS FOR GRANTING THE WRIT

I. THE NEW YORK STATE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S RULING IN *NEW YORK v. FERBER*, 458 U.S. 747.

The New York State Court of Appeals, in affirming Petitioner's conviction, wrote:

> "Accordingly, because of the State's compelling interest in protecting its children, the *Ferber*

> Court concluded that the possible danger of infringement on serious literary, artistic, scientific or educational works did not render the statute unconstitutionally overbroad."

However, the Court of Appeals failed to consider the remainder of the opinion which provided that, " . . . whatever overbreadth may exist . . . should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ferber*, supra, 773, 774.

Thus, this Court clearly recognized that there may be instances where possession of child pornography may be protected by the First Amendment. Although those instances were not so substantial as to render the entire statute unconstitutional, such cases should be determined on a case-by-case analysis.

The Court of Appeals ruling, that possession of child pornography is *never* protected by the First Amendment, forecloses the case-by-case analysis anticipated by this Court.

The Court of Appeals did not determine that this Petitioner was not entitled to claim that he possessed the material for scientific purposes, but rather ruled that there are *no* circumstances under which possession of such materials is protected by the First Amendment.

II. THE NEW YORK COURT OF APPEALS' RULING CONTRADICTS THE LANGUAGE IN CONCURRING OPINIONS OF THIS COURT IN *NEW YORK v. FERBER*, 458 U.S. 747.

The New York State Court of Appeals' ruling is that possession of child pornography for research purposes is never protected by the First Amendment. Under this ruling, any possession of such material, even if for legitimate research purposes, may be made a crime.

This contradicts the language of concurring opinions of this Court in *New York v. Ferber*, supra.

The concurring opinion of Justice Brennan, joined by Justice Marshall, provides:

> "But in my view application of 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment . . . In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed 'material outside the protection of the First Amendment.' " *Ferber*, supra, 776.

In his concurring opinion, Justice Stevens wrote:

> "Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime." *Ferber*, supra, 778.

The concurring opinion of Justice O'Connor recognized the possibility that the possession of these materials may, in some instances, be protected by the First Amendment.

"On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute . . . Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the National Geographic, might not trigger the compelling interests identified by the Court." *Ferber*, supra, 775.

III. THIS CASE PRESENTS THE ISSUE OF PURE POSSESSION FOR RESEARCH PURPOSES. IT DOES NOT INVOLVE THE CREATION OR DISSEMINATION OF CHILD PORNOGRAPHY.

The Petitioner was accused and convicted of the possession of child pornography on the hard drive of his computer. He is not accused of having created this child pornography. Those images on his computer were created by someone other than Petitioner.

The Petitioner neither disseminated nor displayed the images to any other individuals.

Since Petitioner has an extensive background in this field through his education, his service in the United States military and his work as a civilian, it cannot be

concluded that his contention that his possession of these materials was for educational and research purposes lacks merit.

No other decision has been found which has squarely faced this issue.

The issue presented by this case is solely the question of whether mere *possession* of child pornography for educational and scientific purposes is protected by the First Amendment. This case does not present the question of when the *creation* of such material may be protected.

In *New York v. Ferber*, supra, this Court was concerned with the circumstances under which children may be employed to *produce* pornographic material.

"How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of Section 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty." *Ferber*, supra, 773.

While the First Amendment may not protect those who use children in creation of pornographic material, even where it has some literary or artistic value, it may protect those in possession of such material created by others for scientific research purposes.

This case presents the single issue of whether a researcher's possession of such materials is protected by the First Amendment.

IV. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS PRECLUDES ANY RESEARCH IN THE AREA OF CHILD PORNOGRAPHY.

The State has a compelling interest in the protection of children. This includes protecting children from child abuse and from being portrayed in sexually explicit material when they are below the age of consent. It is clearly within the State's power to proscribe conduct which encourages children to become engaged in sexual activities.

However, the State has an equally compelling interest in preventing sexual abuse of children by developing effective assessment and treatment programs for those involved in the use of children for sexual purposes.

It would be virtually impossible to develop effective assessment and treatment programs for such persons without conducting scientific studies. It is essential to know, not only who is transmitting such material, but also the content of the material being transmitted.

The production of child pornography will not be increased by permitting legitimate scientific research on materials previously produced. Since this material has already been created by others, it is unlikely that the use of such material by a researcher will encourage its creation. Those possessing such material for legitimate purposes will be a very small segment of those in possession of such material.

If effective treatment and assessment programs can be developed for those who are involved in the creation

and dissemination of child pornography, then it is more likely that recidivism can be prevented and the production of child pornography reduced.

The eradication of criminal activity by merely criminalizing the proscribed conduct has not been shown to be effective. It is for this reason that programs have been developed to treat people for substance abuse, even though there are strict laws criminalizing the use and possession of such substances. Similarly, programs must be developed to treat those who are involved in child pornography.

The decision of the New York State Court of Appeals, if it stands, precludes any study of child pornography by qualified persons.

It would preclude, for example, university professors from reviewing material which had been impounded by the police following the execution of a search warrant, although, clearly their review of these materials would not increase the market for these materials. While the police would be entitled to be in possession of such materials for the purpose of prosecuting the offender, professors would be prohibited from being in possession of such materials for the purpose of studying the same.

Similarly, anthropologists who are studying photographs of other cultures, where such conduct is an accepted part of their religious or tribal practices, would be violating the law, although their possession would not be increasing the demand for illegally produced material.

This decision, if permitted to stand, severely discourages any research in this area. Those researchers, even in

other States, who wish to undertake scientific research in this field, will be reluctant to do so, unless this Court clearly decides the extent of First Amendment protection. This will severely impede, if not totally extinguish, the pursuit of the development of any effective assessment and treatment programs, to the detriment of those children who will be victims of those who could have been treated.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant certiorari to determine whether one who is in possession of child pornography for legitimate scientific research is protected by the First Amendment of the United States Constitution.

Respectfully submitted,

MARK A. WOLBER
239 Genesee Street, #307
Utica, New York 13501
(315) 724-3127

FRANK E. BLANDO
Counsel of Record
811 Court Street
Utica, New York 13502
(315) 735-3556

State of New York
Court of Appeals

---

4 No. 9

The People &C.,
Respondent,

v.

Paul Fraser,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Mark a. Wolber, for appellant.
Michael A. Arcuri, for respondent.
Marlene O. Tuczinski, for the Attorney General.

SMITH, J.:

The primary issue is whether constitutional and statutory defenses should have been allowed during defendant's prosecution for possessing a sexual performance by a child. We hold that the defendant was properly convicted.

Defendant took his computer to a repair shop to replace the hard drive. While servicing the computer, a technician noticed that some of the graphic files had suspicious titles implying child pornography. Before defendant returned to retrieve his computer, the technician copied some of the files from defendant's hard drive. When the technician and two other employees viewed the copy, they found pictures of young children engaged in sexual activity with adults. Defendant was charged with two counts of possessing a sexual performance by a child

(Penal Law § 263.16).[1] Before trial the People made a motion to preclude an affirmative defense (based on scientific use) pursuant to Penal Law § 235.15(1), and defendant moved to assert the defense at trial. The Trial Judge precluded the affirmative defense and refused to instruct the jury with respect to it.

At trial, defendant testified that he had a Master's Degree in Social Work, was a certified social worker, and had extensive experience in treating victims and offenders of child abuse. He stated that the Oneida County Deputy Commissioner of Mental Health invited him to join a work group formed to develop a treatment program for persons convicted of child pornography crimes. Defendant further testified that he possessed the child pornography in connection with his scientific research to develop treatment for persons transmitting child pornography on the Internet, explaining that he compiled the prohibited material by downloading files sent to him from individuals he communicated with in various chat rooms where child pornography was discussed.

Defendant requested a jury instruction on his affirmative defense that possession of child pornography is permissible for literary, artistic, scientific or educational purposes. Defendant also requested that the court charge the jury on the mistake of law defense set forth in Penal

---

[1] Defendant was also charged with violating Penal Law § 263.11, possessing an obscene sexual performance by a child, but prior to trial, the District Attorney moved to dismiss these charges and proceeded solely on the two counts of Penal Law § 263.16.

Law § 15.20(2) (a), asserting that he was operating under the mistaken belief that his conduct was legal. The court denied the requests.

Defendant was found guilty of two counts of possessing a sexual performance by a child and sentenced to five years probation, 550 hours of community service and a $1000 fine. The Appellate Division affirmed the conviction, stating that the scientific justification affirmative defense in Penal Law § 235.15(1) "applies only to obscenity prosecutions and prosecutions under Penal Law § 235.21(3) and thus does not apply here," and that the mistake of law defense set forth in Penal Law § 15.20(2) (a) was also inapplicable. The Appellate Division further held that "graphic images stored in defendant's computer were either photographs that were converted to digital images by a scanner or taken by a digital camera" (264 A.D.2d 105, 110). A Judge of this Court granted defendant leave to appeal.

On this appeal, defendant contends that because he downloaded the prohibited material for scientific research purposes, he was constitutionally entitled to invoke a "scientific justification" defense similar to that set forth in Penal Law § 235.15. Defendant further contends that he was entitled to a mistake of law defense as set forth in Penal Law § 15.20(2) (a), and that in any event a visual image stored in a computer hard drive is not a "photograph" within the meaning of Penal Law § 263.00(4).

Penal Law § 263.16 provides a "person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he knowingly has

in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age." A performance is defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience" (Penal Law § 263.00[4]). Penal Law § 263.20 contains affirmative defenses applicable when a defendant in good faith reasonably believes that the persons depicted were over 16 years of age and when a person is engaged in certain specified occupations. Those defenses are not claimed here.

The defense claimed by defendant is found in Penal Law § 235.15(1). That section provides that in "any prosecution for obscenity, or disseminating indecent material to minors in the second degree in violation of subdivision three of section 235.21 of this article, it is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing the same." Application of that affirmative defense, however, is expressly limited to the offenses stated in the statute – none of which are at issue here. Penal Law § 263.16 is neither an article 235 offense nor an obscenity statute. Whether the absence of such a defense renders the child pornography statute unconstitutional is the issue before us.

Defendant challenges his conviction as a violation of his First Amendment right of freedom of expression and his equal protection rights under the Federal and State constitutions. Defendant does not assert that the statute

should be declared unconstitutional because it is facially overbroad, but rather asserts that the statute is overbroad as applied to him and other classes of people who may legitimately come into possession of pornography. Defendant also alleges that the trial court violated his due process rights when it refused to charge a defense set forth in Penal Law § 235.15(1).

In *New York v Ferber* (458 US 747), which upheld Penal Law § 263.15 ("Promoting a sexual performance by a child"), the Supreme Court concluded that child pornography is not protected by the First Amendment, explaining that when "a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment" (458 US at 764).

The First Amendment protects non-obscene sexually explicit material involving adults (*Miller v California*, 413 US 15, 24). The First Amendment, however, does not protect pornographic material involving children (*Ferber, supra*, 458 US at 756-764). States enjoy greater latitude in regulating child pornography because of the government's compelling interest in safeguarding its children. Indeed, the Supreme Court in *Ferber* addressed this very issue when it decided the constitutionality of Penal Law § 263.15. The *Ferber* Court recognized that "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the

child [who has been abused] whether or not the material * * * has a literary, artistic, political or social value' " (*Ferber*, 458 US at 761 [citations omitted]). Accordingly, because of the State's compelling interest in protecting its children, the *Ferber* Court concluded that the possible danger of infringement on serious literary, artistic, scientific or educational works did not render the statute unconstitutionally overbroad.

In *Osborne v Ohio* (495 US 103), the Supreme Court upheld a State's authority to prohibit mere possession of child pornography. While that statute did contain exceptions for literary, educational and scientific purposes, nothing in the Supreme Court's opinion indicated that these limitations were required (*see also, United States v Matthews*, 209 F3d 338 [4th Cir], *cert denied* 121 S. Ct. 260); *State of Washington v Williams*, 1998 WL 808007 [Wash App.Div. 1].

Osborne reiterated the Supreme Court's concern, articulated in *Ferber*, that the State has an interest in stamping out child pornography. Noting that the Ohio statute on its face prohibited the possession of nude photographs and that nudity, without more, was constitutionally protected, the Court rejected *Osborne's* overbreadth challenge because the Ohio Supreme Court had construed the statute as prohibiting nudity "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals" (495 US at 113). In the present case, sexual performance includes "sexual conduct by a child less than sixteen years of age" (Penal Law § 263.00[1]) and sexual conduct "means actual or simulated sexual intercourse, deviate sexual intercourse, sexual beastiality, masturbation, sado-masochistic abuse, or lewd exhibition

of the genitals" (Penal Law § 263.00([3]). Thus, on its face, New York's child pornography statute is more narrowly drawn than the Ohio law reviewed in *Osborne v Ohio* (*see, Ferber, supra,* 458 US at 765). The *Osborne* court also rejected defendant's contention that *Stanley v Georgia* (394 US 557), in which the Court struck down a Georgia statute outlawing the private possession of obscene material, authorized the private possession of child pornography. Again, the State's interest in prohibiting the sexual exploitation of children was paramount. As the Supreme Court noted, while the State could not regulate the private thoughts and possessions of adults, it could attempt "to destroy a market for the exploitative use of children" (495 US at 109).[2]

Defendant's contention that his conviction is a violation of equal protection is also without merit. He argues that Penal Law § 263.16 violates the equal protection guaranteed by the State and Federal constitutions because it criminalizes possession of the same pornographic material that would otherwise be allowed under Penal Law article 235 if the pornography were classified as obscene. The New York statutory scheme, which treats the offenses differently, "need only be supported by some rational basis to survive constitutional scrutiny" (*People v Walker,* 81 N.Y.2d 661, 668). The *Ferber* Court emphasized that the compelling State interest in eradicating child pornography and preventing child exploitation and abuse

---

[2] Plainly if the New York Legislature wished to allow a defense, such as that provided by the Ohio Statute, for literary, educational or scientific uses of child pornography, it could do so.

abuse justified the prohibition against child pornography. Because defendant has made no showing that the statutory scheme is irrational or contrary to public policy, the equal protection argument must fail.

Two other issues merit discussion. The first issue addresses defendant's contention that he should have been allowed to present a mistake of law defense, as set forth in Penal Law § 15.20(2) (a), based on his belief that § 235.15 permitted him to possess child pornography for research purposes. Defendant maintains that the trial court committed reversible error by not instructing the jury regarding the effect of his mistake upon his criminal liability.

At trial, defendant presented evidence that he was invited to participate in a work group of volunteers, formed by the Oneida County Department of Mental Health with the approval of the Oneida County District Attorney's Office, to assist the County in developing a program for assessment and possible treatment of people convicted of Internet pornography. In connection with his involvement in the work group, defendant claims he unilaterally decided to collect child pornography from the Internet as part of a scientific research project he was conducting. Defendant claims further that prior to obtaining the prohibited material, he made a diligent effort to learn the applicable law. Defendant contends that the plain language of Penal Law article 235 allows possession of child pornography for scientific research purposes and that he could not have known that digital computer graphic images would constitute a violation of § 263.16.

Penal Law § 15.20(2) (a) ("Effect of ignorance or mistake upon liability") states that a "person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in [a] statute or other enactment * * * ." The " 'official statement of the law' must in fact authorize the conduct in question; a reasonable belief that the statement authorizes such conduct is insufficient" (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, CPL 15.00, at 49).

Defendant contends that Article 263 authorized him to possess images on his computer hard drive of children engaged in sexual activity, if he did not display the images to an audience, because technically the images were not photographs or other visual representations exhibited before an audience. Penal Law § 263.00(4) defines "sexual performance" as "any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience." Rather than showing that there was an "official statement of the law contained in the statute," defendant maintains that a digital computer image is not a photograph within the meaning of Penal Law § 263.00(4). Defendant does not show that he relied on an official publication in construing the statute incorrectly. Thus, contrary to defendant's contentions, there is nothing in Penal Law § 263.00(4) that would support his interpretation of the statute as allowing the possession of the prohibited material. Accordingly, "the underlying statute never *in fact authorized* the defendant's conduct;

the defendant only thought that the statutory exemptions permitted his conduct when, in fact, the primary statute clearly forbade his conduct" (*People v Marrero*, 69 N.Y.2d 382, 389). Thus, because there is no showing that defendant meets the exception contained in the statute, Penal Law § 15.20(2) (a) is not available to him.

The second, related issue concerns whether computer graphic images are "photographs" within the meaning of Penal Law § 263.00(4) so as to sustain prosecution pursuant to Penal Law § 263.16. The indictment charged defendant not with the possession of photographs but with the "possession of numerous computer graphic files which contained images of children less than sixteen years of age engaged in sexual conduct." Defendant contends that his possession does not fall within the purview of the statute because computer graphic images are not "photographs" nor do they constitute an "other visual representation" because he did not "exhibit before an audience" the prohibited material (Penal Law § 263.00[4]). Thus, according to defendant, it is legal to possess other forms of child pornography that do not constitute a play, motion picture, photograph or dance, so long as the pornographic "visual representation" is not displayed before an audience.

Defendant's narrow reading of the statute does not comport with reasonable interpretation. By enacting Article 263, the New York Legislature intended to "employ broad measures to eradicate child pornography in all its forms" (*People v Keyes*, 75 N.Y.2d 343, 348). Consistent with this expressed intent, the Appellate Division properly concluded that "the graphic images stored in defendant's computer were either photographs that were

converted to digital images by a scanner or taken by a digital camera" (264 A.D.2d 105, 110). Defining digital computer images as photographs falls within the "plain and natural meaning of the statute" (*People v Keyes, supra,* at 348) and gives effect to the objects of the law.

Accordingly, the order of the Appellate Division should be affirmed.

****

Order affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Levine, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Decided February 20, 2001

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(255) KA 99-719. (Oneida Co.) – PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, v PAUL FRASER, DEFENDANT-APPELLANT. – Judgment unanimously affirmed. Opinion by Pigott, Jr., J.: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of possessing a sexual performance by a child (Penal Law § 263.16). Defendant contends that a visual image stored in a computer hard drive is not a "photograph" within the meaning of Penal Law § 263.00 (4), and that County Court erred in denying his requests to charge the affirmative defense set forth in Penal Law § 235.15 (1) and the justification defense set forth in Penal Law § 15.20 (2) (a). The judgment should be affirmed.

I

At about 9:00 A.M. on June 12, 1998, the operations manager of a consulting and computer repair business in Rome, New York, received a telephone call from defendant. Defendant indicated that he wanted to have the hard drive on his computer replaced but only if he could be present while the work was being performed. The manager agreed to do so, and defendant brought in his computer later that morning. The manager disassembled the computer, obtained a new hard drive, and began to copy the files from defendant's old hard drive to the new one. A problem developed in the power supply in defendant's computer, which resulted in damage to the new hard drive. Defendant was informed that a new power supply would have to be installed in his computer and

that it could not be done right away. Defendant reluctantly agreed to leave his computer at the store.

The manager replaced the power supply and installed a new hard drive. As he copied the files from defendant's old hard drive to the new one, the manager observed that some of the file names appeared "suspicious-looking". He immediately suspected that the files contained child pornography based on the file names and the "suspicious nature of the customer". After he reassembled defendant's computer, he asked a technician to copy the contents of defendant's old hard drive to a hard drive of a computer located in the store. Defendant arrived at the store unexpectedly and the manager returned defendant's computer and old hard drive to him. Later that day, the manager and two technicians viewed the copied files and observed pictures of young children engaged in sexual activity with adults. The manager telephoned the Rome Police Department and was referred to the State Police. A State Trooper arrived at the store the following day and removed the store's hard drive containing defendant's files. A search warrant was executed at defendant's home, and defendant's computer was seized.

Defendant was indicted and charged with two counts of possessing an obscene sexual performance by a child (Penal Law § 263.11) and two counts of possessing a sexual performance by a child (Penal Law § 263.16). Prior to trial, the People moved to dismiss the two counts of possessing an obscene sexual performance by a child, and proceeded solely on the two counts of possessing a sexual performance by a child.

Penal Law § 263.16 provides: "A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age." Performance is defined in Penal Law § 263.00 (4) as "any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience." The indictment charged defendant with violating Penal Law § 263.16 by possessing "numerous computer graphic files which contained images of children less than sixteen years of age engaged in sexual conduct".

In support of a pretrial suppression motion, defendant, who is a licensed social worker specializing in treating sexually-related disorders, indicated his intention to rely upon the affirmative defense set forth in Penal Law § 235.15 (1), which provides: "In any prosecution for obscenity, or disseminating indecent material to minors in the second degree in violation of subdivision three of section 235.21 of this article, it is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing the same." The People made a motion in limine seeking to preclude defendant from introducing evidence in support of an affirmative defense pursuant to Penal Law § 235.15 (1). The prosecutor argued that the affirmative defense had no application to the present prosecution because defendant was not being

prosecuted for obscenity or disseminating indecent material to minors. The court agreed, granted the motion and refused defendant's request to charge the jury with that affirmative defense.

At the close of the People's proof, defendant moved to dismiss the charges on the ground that the People had failed to prove that he possessed a sexual performance by a child. Defendant argued that a graphic image on a hard drive is not a photograph, and further argued that he could not be convicted of possessing a visual representation because there was no proof that he ever exhibited the images to an audience, as required by Penal Law § 263.00 (4). The People countered that a visual image stored on a hard drive may be construed as fitting within the definition of a "photograph", given the legislative intent to eradicate the market for child pornography in all forms. The court agreed with the People and denied the motion to dismiss the indictment. The court also granted the People's request to charge that, as a matter of law, a photograph "may include a computer graphic image".

Defendant testified on his own behalf that he is a licensed social worker and that he downloaded child pornography from the Internet in connection with research he was conducting to develop therapeutic treatment methods for Internet child pornographers. He testified that he was a member of a task force made up of mental health professionals and formed by the Oneida County Department of Mental Health, with encouragement from the Oneida County District Attorney's Office, to develop such treatment programs. He further testified that he had informed other members of the task force, including the Deputy Commissioner of the Oneida

County Department of Mental Health, that he was engaged in research concerning persons who deal in child pornography on the Internet. According to the testimony of other members of the task force, including the Deputy Commissioner, defendant indicated to them that he was conducting research concerning child pornography on the Internet and sending questionnaires to persons he identified as disseminators of child pornography on the Internet. He never informed them, however, that he was downloading child pornography from the Internet nor had anyone in the task force given defendant permission to do so.

At defendant's request, based upon defendant's testimony that the District Attorney's Office was involved in the task force of which defendant was a member, the court charged the jury with the justification defense pursuant to Penal Law § 15.20 (2) (d). That section provides that it is a defense to criminal liability that defendant engaged in prohibited conduct because he had a mistaken belief that the conduct was legal as the result of an interpretation of a statute or law "officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law." The court refused defendant's request to charge the justification defense pursuant to Penal Law § 15.20 (2) (a). That section provides that it is a defense to criminal liability that defendant engaged in prohibited conduct because he was operating under a mistaken belief that the conduct was legal based on "an official statement of the law contained in * * * a statute or other enactment". Defendant was convicted as charged and

sentenced to probation for five years and 500 hours of community service. Defendant appeals.

II

Defendant contends that the court erred in charging the jury that a photograph may include a computer graphic image because the term "photograph", which is not defined in the Penal Law, when given its ordinary meaning, requires that an image be produced on paper and be visible to the unaided eye. A computer graphic image, unlike a photograph, is visible to the unaided eye only when processed through a computer and displayed on a monitor.

Penal statutes "must be construed according to the fair import of their terms to promote justice and effect the objects of the law" (Penal Law § 5.00; *see also, People v Keyes,* 75 NY2d 343, 348). In enacting a statute, "it is impossible for the Legislature to consider every societal and technological change that may occur and the effect those changes may have upon the particular conduct it is seeking to regulate" (*Rutledge v State,* 745 So 2d 912, 916 [Ala]). Like the court in *Rutledge,* (*supra,* at 916), "[w]e do not believe that the Legislature is required to amend the law to accommodate every advancement in technology."

When the Legislature enacted the statutes prohibiting possession of child pornography, its purpose was to prohibit the possession of child pornography in every form as a means of eradicating the market for such material. As Governor Pataki noted, "Someone who possesses child pornography does so at the expense of an exploited child, and society cannot hope to eradicate this evil

unless the market for these perverse materials is destroyed" (Governor's Mem approving L 1996, ch 11, 1996 N Y Legis Ann, at 630; *see also, People v Keyes, supra,* at 348; *People v Gaito,* 199 AD2d 615, 616, *lv denied* 83 NY2d 805).

The graphic images stored in defendant's computer were either photographs that were converted to digital images by a scanner or taken by a digital camera (*see, State v Cohen,* 696 So 2d 435, 438, n 5 [Fla]). A graphic image of a child engaged in sexual conduct captures the child's humiliation and preserves it into the future as permanently as does any photograph (*see, Osborne v Ohio,* 495 US 103, 111, *reh denied* 496 US 913; *New York v Ferber,* 458 US 747, 760, n 10). If anything, the ease of transmitting photographs over the Internet has the effect of increasing the market for child pornography. "The use of computers to transmit and possess child pornography can only increase the market for child pornography – especially with the clarity of images, the speed of transmission, and the ability to upload or download the images with ease" (*State v Cohen, supra,* at 440). Construing the terms of the statute to "effect the objects of the law" (Penal Law § 5.00), we conclude that the court properly charged the jury that a photograph may include a computer graphic image.

III

Defendant further contends that the court erred in denying his request to charge the affirmative defense set forth in Penal Law § 235.15 (1), which, *inter alia,* protects the use of obscene material by persons for scientific,

educational or governmental purposes. As the court properly determined, this affirmative defense, by its own terms, applies only to obscenity prosecutions and prosecutions under Penal Law § 235.21 (3) and thus does not apply here.

Defendant contends, however, that the statutes prohibiting possession of child pornography are unconstitutional unless that affirmative defense is made applicable to them. The original single-degree obscenity statute and the affirmative defense thereto were enacted in 1965, and article 263 of the Penal Law, which made it a felony to use or promote a child in a sexual performance, was enacted in 1977. Defendant contends that, because mere possession of child pornography was not then prohibited, the "scientific" defense would not have been necessary, and thus, the affirmative defense set forth in Penal Law § 235.15 (1) was not made applicable to article 263. In 1990, the Supreme Court held that individual States could criminalize the possession and viewing of child pornography (*see, Osborne v Ohio, supra,* at 111). In response to that decision, the Legislature, in 1996, enacted Penal Law §§ 263.11 and 263.16, making it a felony to possess an obscene sexual performance by a child or a sexual performance by a child.

Defendant acknowledges that the State has a compelling interest in preventing the sexual exploitation of children but contends that the State "has an equally compelling interest in preventing sexual abuse of children by developing effective assessment and treatment programs for those convicted of using children for sexual purposes". He contends that, to develop effective treatment programs for offenders, it is necessary to conduct

studies, not only concerning the type of persons transmitting pornography, but also concerning "the type of pornography being transmitted". Defendant also contends that the lack of a "scientific defense" to the child pornography statutes violates equal protection, because persons who possess obscene material for research purposes are not subject to prosecution while persons who possess child pornography for research purposes are.

Defendant's constitutional arguments must be rejected. Child pornography is not protected speech under either the Federal or the State Constitution (*see, People v Keyes, supra,* at 349). In concluding that a State may criminalize the mere possession of child pornography that is not necessarily obscene, the Supreme Court stated that "[i]t is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand" (*Osborne v Ohio, supra,* at 109-110).

We reject defendant's contention that the State's interest in allowing persons to use child pornography for research purposes is as compelling as the State's interest in preventing the sexual exploitation of children. As the Supreme Court noted, "[t]he value of *permitting live performances and photographic* reproductions of children engaged in lewd sexual conduct is *exceedingly modest, if not de minimis.* We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work" (*New York v Ferber, supra,* at 762-763).

Given the nature and extent of the harm to children who are involved in the production of pornography, the compelling interest of the State in eradicating the market for that despicable material and the de minimis value of child pornography for scientific or educational purposes, it is a reasonable determination by the Legislature not to allow a person charged with possession of child pornography to assert the "scientific" defense (*cf., People v Ferber,* 57 NY2d 256, 260 [Meyer, J., concurring] [*New York v Ferber, supra, on remand*]). New York courts have repeatedly held that the "primary concern of the statute is with the effect the depicted conduct has on the children involved" (*People v Gaito, supra,* at 616; *see also, People v Keyes, supra,* at 347; *People v Duboy,* 150 AD2d 882, 883, *lv denied* 74 NY2d 846). It is no less traumatic for an innocent child to be sexually abused in front of a camera when the images produced are allegedly used for a "scientific" purpose than when the images are used to satisfy the prurient desires of the possessor (*see, Rutledge v State, supra,* at 915).

For many of the same reasons, defendant's contention that the statute violates equal protection fails. Defendant contends that it is a violation of equal protection to allow a person who possesses obscene material to assert a "scientific" defense while not allowing a person who possesses child pornography to assert a comparable defense. The compelling State interest in protecting children from being defiled far outweighs the value of allowing the product of the child's defilement to be used for "scientific" purposes. As the Court of Criminal Appeals

of Alabama so aptly noted, "Child pornography is different from general obscenity both in the degree of depravity involved and in the nature and extent of the harm involved. As for depravity, whatever may be said, and has been said, about what consenting adults do with and to each other, nothing so debases civilized society as the defilement of children for purposes of producing photographs like those involved in these cases" (*Rutledge v State, supra,* at 915, quoting *Dannelley v State,* 397 So 2d 555, 570 [Ala], *cert denied* 454 US 856).

IV

Finally, defendant contends that he was entitled to a charge on the defense of justification pursuant to Penal Law § 15.20 (2) (a). That contention is without merit.

The mistake of law defense set forth in Penal Law § 15.20 (2) (a) relieves a person of criminal liability if he or she engaged in such conduct in reliance upon an official statement of the law contained in a statute or other enactment. Defendant contends that Penal Law § 263.00 (4) is ambiguous in defining a performance as, *inter alia,* a photograph or other visual representation only if exhibited before an audience, and that his mistaken belief that the possession of a computer image was not illegal unless exhibited to an audience is reasonable. In *People v Marrero* (69 NY2d 382, 387), the Court of Appeals noted that the mistake of law defense "was intended to be a very narrow escape valve" and does not apply even where a defendant has made a "good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes, many of which are concededly complex"

(*People v Marrero, supra,* at 392). The Court noted that the defense applies only where "an individual demonstrates an effort to learn what the law is, relies on the validity of the law and, later, it is determined that there was a *mistake in the law itself*" (*People v Marrero, supra,* at 390). That is not the case here.

V

Accordingly, the judgment should be affirmed. (Appeal from Judgment of Oneida County Court, Donalty, J. – Possessing Sexual Performance By Child.) PRESENT: HAYES, J. P., WISNER, PIGOTT, JR., SCUDDER AND LAWTON, JJ. (Filed Feb. 16, 2000.)

STATE OF NEW YORK
ONEIDA COUNTY COURT
ONEIDA COUNTY COURT HOUSE
ELIZABETH STREET
UTICA, NEW YORK 13501

SHARON CARRAWAY
ASSOCIATE COURT CLERK
315-798-5809

RECORD OF CONVICTION
ONEIDA COUNTY COURT

STATE OF NEW YORK) INDICTMENT NO.:
COUNTY OF ONEIDA) 198-424
CITY OF UTICA) SCI NO.: _____

the PEOPLE OF THE STATE OF NEW YORK
VS
PAUL FRASER

D.O.B.: 5/17/45

THE ABOVE-NAMED WAS DULY CONVICTED IN ONEIDA COUNTY COURT ON 1/29/99 UPON ~~[illegible]~~ UPON A TRIAL OF Possessing a Sexual Performance by a Child-263.16PL, 2 counts E felony, ON 3/26/99, WAS SENTENCED TO five years probation, 500 hours of community service, $1,000.00 fine, $155.00 surcharge/ crime victim assistance fee, defendant to register as a "sex offender", Level 1. Probation term to run concurrent on each count.

I CERTIFY THAT the ABOVE IS A TRUE EXTRACT FROM THE MINUTES OF SAID COURT, KEPT BY ME AS A CLERK THEREOF.

/s/ Susan M. Nowak
SUSAN M. NOWAK, COURT CLERK

WITNESS THE SEAL OF SAID COURT, AT THE CITY OF UTICA, NEW YORK, THIS 10th DAY OF August, 1999.